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No. 82-183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA

v.

JANE DOE,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where testimony implicating a target is compelled from his spouse before a grand jury to corroborate evidence against a third party, solely to gain in some future proceeding that party's testimony against the target, may the witness-spouse invoke the privilege against adverse spousal testimony.

2. Whether the privilege against adverse spousal testimony should extend to testimony suggesting joint criminal activity of the spouses.

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STATEMENT

The government seeks review of a judgment of the court of appeals which sustained an order of the district court allowing respondent, a witness, to invoke the privilege against adverse spousal testimony as a bar to answering questions before a grand jury. The questions were drafted not to name directly respondent's spouse, creating the appearance of an inquiry concerning a third party (see C.A. App. 23a-26a). However, before the questions were proposed, the government possessed and knew the contents of a tape recorded conversation between respondent and the third party (see C.A. App. 50a-83a) which is replete with references directly adverse to respondent's spouse.[1]

Thus, respondent's claim of privilege is rooted in facts demonstrating that her answers to the questions would result in testimony directly adverse to her spouse. Leaving no doubt that this is so, it has been conceded (Pet. 3), that respondent's spouse was a target[2] of the very investigation in which her testimony was sought.

1. The statements preserved reveal grounds for commencing this investigation as well as the basis for invoking the privilege. Knowing the government possessed the recording and presumably aware of other information adverse to her spouse, respondent invoked the privilege when subpoenaed to appear before the grand jury (C.A. App. 4a). Prior to filing a motion to compel testimony, the government provided respondent with a copy of a transcript (C.A. App. 10a) showing the recording was transcribed on "2/28/80" (C.A. App. 50a), nearly one year before the hearing on the motion. When seen in light of the transcript, the proposed questions call for responses which directly implicate respondent's spouse.

Respondent's claim that many of the questions proposed were the product of an illegal interception of an oral communication was sustained by the district court. Because the government did not appeal that ruling, it has foregone the use of the tape recording as the best evidence to incriminate the third party whom it complains before this Court is the "unjustified windfall" beneficiary of the privilege relied on by respondent (Pet. 16).

2. The Department of Justice, providing uniform guidance to United States Attorneys, has defined the term "target" as "a person as to whom the prosecutor or the grand jury has substantial evi-

To respect the claim of privilege while seeking to compel respondent to answer the questions, the prosecutor filed an affidavit in the district court certifying that "nothing said by (respondent) will be used, either directly or indirectly, against her husband . . . in any legal proceedings." (C.A. App. 27a). This certification appeared to promise that the government would confer on the target spouse immunity coextensive with the statutory "use and derivative use" immunity which had earlier been conferred on respondent. 18 U.S.C. §6002; *Kastigar v. United States*, 406 U.S. 441 (1972).

Subsequently, retreating from its promise to insulate totally her spouse from direct or derivative incrimination by any statement of respondent, the government reduced its commitment to refrain merely from naming the target spouse in any indictment presented to the particular grand jury before which the investigation was then being conducted (C.A. App. 32a-33a).

Because respondent's spouse was a target of the same investigation in which her testimony was sought and because it was found respondent's testimony would implicate him, the court of appeals and the district court perceived the modified promise to be a deception designed solely to dispense with the invocation of the privilege.[3] Criticizing the affidavit as an improper device the court of appeals declared:

NOTE 2—*(Continued)*

dence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." United States Attorneys' Manual, Tit. 9, §11.250.

3. Stating that under such circumstances the danger to the marital relationship is manifest, the district court admonished:

> In essence, before the ink is dry on the Government's affidavit, it has by its own statements transformed that sworn promise into a worthless protection. It is reneging on its sworn promise by stating it will do, even before (respondent) testifies, the very thing its affidavit said it would not do. See *Snoonian*, *supra*, at 112. That is, it will "indirectly" use the testimony of (respondent) to "implicate" her husband in criminal activity for pur-

> (W)e do not believe that the simple expedient of bringing the husband's indictment before a separate grand jury adequately respects the privilege. (Pet. App. 10a n. 11).

Two statements of the prosecutor, one of record and the other made subsequent to the decisions below, support the holding of the court of appeals.

At the hearing before the district court, the prosecutor, in response to a question from the judge, "What do you want her testimony for?", answered:

> Against (third party), Your Honor. We want to present an indictment which is *already drafted* to the grand jury . . . naming (third party) in that conspiracy that (witness spouse) pleaded guilty to. (C.A. App. at 154a; emphasis added).[4]

Not until after the decision of the court of appeals, in an article critical of the court's decision, was a statement published by the prosecutor making it known that such evidence existed. The prosecutor wrote:

> (Respondent's) co-defendant has *previously implicated* (third party) but the government considers (respondent's) testimony against (third party) to be an essential condition precedent to presentment of an indictment against (third party) because it is the

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poses of another "legal proceeding." A clearer case serving to seriously undermine the important purposes of the marital privilege would be hard to imagine. (Pet. App. 32a).

4. The indictment against the third party, "already drafted" without testimony by respondent before the grand jury, suggests evidence supporting the charges was available, other than the tape recording on which the prosecutor conceded he did not rely to compel respondent's answers (C.A. App. 148a-151a).

If evidence existed independent of both the tape recording and respondent's testimony, the need to compel her answers, overriding a claim of privilege, would become unnecessary. More importantly, if the courts below had been informed of such evidence, the decisions made, finding the affidavit's promise to be an expedient, would have been supported by an additional vital fact.

> only known potential evidence which can *corroborate* the testimony of her co-defendant against (third party). Purdy, *The Marital Privilege: A Prosecutor's Perspective*, 18 Crim. L. Bull. 309, 314 (1982) (emphasis added).[5]

This disclosure dilutes the prosecutor's contention that respondent's privilege barred evidence vitally needed to indict the third party.[6]

Even without benefit of this disclosure, acknowledging that circumstances may warrant the link between one spouse's testimony and the potential adverse impact on the other may be too attenuated to permit invocation of the privilege, the court of appeals found the facts here not to present such a case. The court stated:

> (W)e do not believe that the Government should be permitted to bootstrap into two proceedings a prosecution based on a single common scheme *for the sole purpose of circumventing the privilege*. It would be anomalous to permit the Government to do indirectly what it is forbidden to do directly. (Pet. App. 10a n. 11; emphasis added).

In sum, the facts of this case show that government intended to circumvent the bar of the privilege by a contrivance to accomplish indirectly what it is prohibited clearly from accomplishing directly.

The government's suggestion of rehearing en banc, having been submitted to the judges who participated in the panel decision and to all other circuit judges of the Third Circuit in regular active service, eleven judges participating in all, was rejected, with three judges dissenting.

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5. Although the article disclaims that it reflects the legal position of the Department of Justice (*Id.* at 309 n. 1), factual statements bearing on the issue here should be noticed by this Court. Fed. R. Evid. 201.

6. Because the testimony of respondent would be merely corroborative, petitioner's claim that the holding below creates a significant obstacle to law enforcement (Pet. 7) is similarly eroded.

REASONS FOR DENYING THE WRIT

I. The court of appeals sustained respondent's claim of privilege in proper adherence to principles of law firmly established by decisions of this Court.

The decision of the court of appeals rests squarely within the rule of other decisions, each in proper adherence to a holding recently made by this Court. Respondent, satisfying the requirement that a witness may invoke the privilege, undisputedly claimed it in devotion to maintaining marital harmony. In circumstances where the government proposes to compel the testimony of respondent, merely to corroborate other evidence available against a third party, with the stated purpose to gain the cooperation of the third party against her spouse in some future proceeding, the government should be prevented from overriding the privilege. Under the facts of this case invocation of the privilege was not speculative or premature. The court of appeals, following the directive of Fed.R.Evid. 501, applied "reason and experience" in balancing the competing interests to determine whether the privilege should apply. Petitioner's suggestion that a procedure similar to that approved in *Kastigar v. United States*, 406 U.S. 441 (1972), should be adopted is in contravention of the approach ordained by Rule 501. Rather than allowing development of the law by courts applying "reason and experience", petitioner suggests a rule which would deny invocation of the privilege until one claiming it could satisfy a burden to show it has been already violated. In effect, petitioner advocates a procedure to replace that prescribed by Rule 501. The facts do not present an appropriate case for this Court to make a decision which would have application to the questions urged by petitioner. The first question presented was properly decided below and, in any event, would be better left to a case-by-case resolution than to a rule announced by this Court having general application to a

range of circumstances infrequently arising. As to the second question presented, petitioner advocates the creation of an exception to the privilege where spouses are joint participants in criminal activity. The facts here are incongruent to the question. Moreover, upon analysis this subject demonstrably would be better left for legislative determination than it is for decision by this Court.

1. In a recent decision redefining the scope of the privilege against adverse spousal testimony, this Court recognized justification for the privilege as "its perceived role in fostering the harmony and sanctity of the marital relationship." *Trammel v. United States*, 445 U.S. 40, 44 (1980). In limiting the invocation of the privilege to a claim by the witness-spouse, this Court observed that the privilege "furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[7] *Id.* at 53.

In the present case, consistent with the holding in *Trammel*, respondent invoked the privilege as a witness after she was immunized pursuant to 18 U.S.C. §6002. Petitioner asks this Court to defeat the claim of privilege where the government seeks to use the fruits of respondent's testimony to indict her spouse who is the ultimate target of the very investigation in which her testimony is sought. Petitioner claims that the holding of the court of appeals contravenes the admonition of this Court in *Trammel*.

The court of appeals, acknowledging the holding in *Trammel*, recognized that the privilege has been sharply criticized (Pet. App. 5a-6a). Sensitive to such criticism, the court, in balancing considerations accorded to important interests underlying the privilege and those ascribed to law enforcement, determined that the government was attempting to accomplish indirectly what it may not accomplish directly. (Pet. App. 9a n. 11).

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7. The Court specifically refused to limit further the privilege as had been urged by a number of authorities. *Id.* at 48-50.

In deciding this case the court of appeals followed an earlier case in which it adhered to the holding in *Trammel*. The court observed that this Court had "decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse." *In Re Grand Jury (Malfitano)*, 633 F.2d 276, 277 (3d Cir. 1980). The court further noted, "the crux of (the) privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding." *Id.* at 277.

Central to the holding of the court of appeals is its observation, shared by the district court, that the government's "sole purpose" was to circumvent the privilege (Pet. App. 10a n. 11). The court determined that such a scheme violated an earlier precedent decided by it, thus making the comment that "the sole difference between the decisions is that here the Government seeks to accomplish indirectly what in *Malfitano* we prohibited it from doing directly." (Pet. App. 7a-8a). The disruption to marital harmony, however, would not be an indirect consequence of abrogating the privilege; rather, as the court stated, "the potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed." (Pet. App. 8a-9a).

In sharp contrast to observations of the court of appeals and findings by the district court, petitioner contends that the decisions below held that respondent could invoke the privilege on the "sole ground that her testimony might incriminate a third party who in turn might incriminate respondent's spouse in some future proceeding." (Pet. 6).

Recognizing that this Court acknowledged recently the validity of the privilege, reaffirming important policy considerations, petitioner does not question the general availability of the privilege in a grand jury proceeding (Pet. 7). Rather, petitioner complains that the application of the privilege in this case expands its traditional

scope, prematurely frustrating the investigative function of the grand jury.

Claiming that an adverse effect on the target spouse is speculative, petitioner suggests respondent should be required to testify before the grand jury, on the condition that her spouse will not be indicted by that grand jury. Assuming it is practical that a claim of privilege could be deferred until such time as an adverse effect develops,[8] petitioner suggests a procedure followed in cases where a witness asserts the privilege against compelled self-incrimination after immunity has been conferred. See *Kastigar v. United States*, *supra*.

Petitioner overlooks important distinctions between this case and those following *Kastigar*. In such cases the witness receives a grant of immunity which is guaranteed broadly by statute. See 18 U.S.C. §6002; *Adams v. Maryland*, 347 U.S. 179 (1954); *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964). In this case the prosecutor provided an affidavit which is binding merely in the federal district over which the jurisdiction of his office extends.

Moreover, it is plain in circumstances of this case that the affidavit made a promise which was not coextensive with the privilege the government attempted to abrogate.[9] The procedure suggested would require the claim of privilege to await the indictment of the spouse, while it was known from the outset that the ultimate objective was to charge him through the device employed.

Petitioner's claim that the privilege is speculative is further contradicted by the facts. Previously it has been shown that the privilege was invoked where (a) answers to the questions proposed would implicate directly respondent's spouse; (b) even though the government af-

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8. The wisdom of allowing the time and expense of an investigation and indictment to be furnished before a claim of privilege may be heard is subject to serious question.

9. See *Kastigar*, *supra*, 406 U.S. at 459; *Zicarelli v. New Jersey State Comm. of Investigation*, 406 U.S. 472 (1972).

firmed it would not seek the indictment of her spouse by the grand jury before which respondent would testify, that promise was determined by the district court and the court of appeals to be a contrivance to circumvent the privilege; and (c) respondent's testimony is not vital to the investigation of criminal activities by the third party.[10]

Since the claim of privilege here was not speculative or premature, this case is inappropriate to apply the *Kastigar* procedure urged by petitioner.[11] Rather, this

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10. The availabilty of evidence otherwise directly implicating the third party has been shown, *supra* at 3-4. Further, the claim that the holding below results in "drastic consequences" (Pet. 7), depriving the grand jury of probative evidence, is diminished by the government's own failure to appeal a ruling of the district court barring use of the tape recording as the best evidence against the third party. Vital evidence is lacking perhaps because this case was viewed by the prosecutor in light of *Trammel* as seeming "to open the door for some government creativity in the face of assertions of the marital privilege." Purdy, *The Marital Privilege: A Prosecutor's Perspective*, *supra* at 311.

11. Petitioner cites *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); and *United States v. Calandara*, 414 U.S. 338, 350 (1974), quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973) as warnings from this Court against obstacles that delay and impede the grand jury's investigation. The factual circumstances of those cases are distinguishable from the present case. In this case evidence other than that sought by overriding the privilege is available, permitting the grand jury to perform its assigned function. In each of the cases relied on by petitioner, evidence other than that which was claimed to be privileged appears not to have been available. Additionally, in *Branzburg*, the Court found that the privilege claimed should not cover the evidence in dispute. The facts of *Calandra* show that the evidence in dispute was in possession of the government before the privilege was asserted. In *Dionisio* the evidence compelled was found not to be protected by the privilege claimed. Moreover, in *Calandra*, this Court specifically stated: "Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States v. Calandra*, *supra*, 414 U.S. at 346 (footnote omitted). See Fed.R.Evid. 1101(c) and (d)(2).

case was properly decided by the court within the directive of Fed.R.Evid. 501 (see Pet. App. 9a-10a n. 11).[12]

2. As an independent basis for review, claiming "significant error" by the court of appeals (Pet. 16), petitioner contends that an exception to the privilege should be created by this Court. Noting that the Third Circuit's decision in this case conflicts with decisions of the Seventh Circuit and the Tenth Circuit,[13] petitioner contends that because this case suggests the spouses were joint participants in criminal activity, "reason and experience" dictate that society's interest in preserving marital harmony should be outweighed by its interest in law enforcement.

The purpose served by the privilege, having been stated so recently by this Court in *Trammel*, suggests that society's interest in fostering harmony in marriages, vital to the rehabilitation of a defendant spouse, would be well served by awaiting further decisions by the courts of appeals before determining what "reason and experience" dictate.[14]

Petitioner's argument, that the exception urged accords with exceptions to other privileges where the rela-

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12. Both the district court and a majority in the court of appeals found that the indictment of respondent's spouse was more imminent than speculative. Applying the test of "reason and experience", required by Rule 501, obviously may lead to differences of opinion as shown by the remarks of the dissenting judge in this case (Pet. App. 19a). See *Trammel v. United States*, *supra*, 445 U.S. at 53-54 (concurring opinion of Justice Stewart). Deference should be given to differences of opinion in applying the test prescribed by the rule. Such questions are resolved appropriately by allowing a case-by-case development of the law, unless it may be said that a decision is clearly erroneous.

13. *United States v. VanDrunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), and *United States v. Trammel*, 583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 455 U.S. 40 (1980).

14. Since the Court's decision in *Trammel v. United States*, *supra*, only the Third Circuit has addressed this question in *In Re Grand Jury (Malfitano)*, 633 F.2d 276 (3d Cir. 1980).

tionship shows abuse, is difficult to accept. Although it is well established that the attorney-client privilege does not shield a client who engages an attorney to obtain advice in the commission of a crime,[15] the distinctions between that privilege and the one between spouses are significant.

Any statement by an attorney resulting from an unlawful breach of the relationship would be limited to the occasion of the breach. The exception does not infringe on earlier untainted confidences between the parties nor obviously are confidences of other clients of the attorney affected. Although the exception would cause the attorney-client relationship to be severed, that relationship is one to which courts have accorded a need for confidentiality in communications not harmony between the parties. Between spouses, a breach of harmony in their relationship may have permanent adverse consequences affecting them and others in the family unit as well.

Petitioner's reliance on cases holding that the privilege protecting confidential communications between spouses does not apply to statements in furtherance of criminal activity, is misplaced. In both *United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978) and *United States v. Kahn*, 471 F.2d 191 (7th Cir. 1972), the communications by or between husband and wife had been recorded by the government pursuant to court authorized interceptions. In each case the court was not confronted with the question whether to override the privilege in order to compel adverse testimony, since the statements were preserved in custody of the government. *Cf. United States v. Calandra, supra*, (evidence claimed to be seized in violation of Fourth Amendment, being already in government custody, permitted inquiry before a grand jury). The only question before the court was whether the communications were confidential or in furtherance of criminal activity. The distinction

15. *Clark v. United States*, 289 U.S. 1, 15 (1933).

beween compelling a witness to give testimony adverse to a spouse and circumstances in which the same is done freely but unwittingly, shows in the former the cause for a breach in marital harmony, whereas in the latter, pressure on the witness wholly is lacking.

Consequently, it is the element of coercion which causes the exception urged "to undermine the marriage precisely in the manner that the privilege is designed to prevent." *In Re Grand Jury (Malfitano), supra,* 633 F.2d at 279.

Furthermore, spouses may act as partners in crime in circumstances as varied as the offenses which are proscribed by federal enactment. If it is said that the privilege should be barred in a particular case, it should be shown that the rehabilitative values of maintaining harmony in the marital relationship are outweighed by the public interest in prosecuting the offense. The analysis is compounded if evidence is available other than that which must be compelled from a spouse.[16]

Therefore, an inquiry whether or when to measure law enforcement as outweighing marital harmony, requires an examination of a variety of social values in a manner more appropriate to legislative determination than to an issue which may be addressed uniformly by a decision of this Court.[17]

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16. Courts are ill suited to determine the social worth of marriages or whether particular marriages are deserving of the protection of the privilege. *Compare United States v. Brown,* 605 F.2d 389, 396 (8th Cir.) (marriage of short duration showing instability is undeserving of protection by the privilege), *cert. denied,* 444 U.S. 972 (1979), *with Ryan v. Commissioner of Internal Revenue,* 568 F.2d 531, 543 (7th Cir. 1977) (marriage of long duration showing such stability that protection of the privilege is unnecessary), *cert. denied,* 439 U.S. 820 (1978).

17. The provisions of Fed.R.Evid. 501 explicitly support this conclusion. The rule provides in pertinent part: "*Except as . . . provided by Act of Congress* . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (emphasis added).

Moreover, as petitioner concedes, because this case merely suggests that the spouses were joint participants in criminal activity (Pet. 16), it is inappropriate for resolving the question presented. When it is unclear whether answers to the questions proposed will reveal joint criminal activity, the question of which party should bear the burden of production arises. This question is left unresolved by petitioner. If the burden is on the witness to establish that the activity was not joint, it would be necessary to violate the privilege in order to assert it. Unless a court were to make the determination, *in camera*, an alternative unlikely to be welcome by the government, the remaining alternative is to put the burden on the prosecution to establish clearly that joint criminality is not merely suggested by the facts. In this case petitioner has made no such showing.[18]

An additional observation makes it surprising that petitioner advocates the exception. As proposed, the exception would confront a witness squarely with three choices: either to incriminate the spouse, or to give evasive or untruthful answers, or not to answer the questions and suffer contempt. It is clear that a spouse who claims the privilege is devoted to the marital relationship. Because devotion between spouses is often a matter of religious conviction, many would consider it a priority not to be abridged by the law. Accordingly, the exception advocated would invite for the prosecution coerced testimony which is at best seriously suspect. The undesirability of using such testimony in the administration of criminal justice seems obvious.

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18. Although it is clear that the answers proposed would implicate adversely the spouse of respondent, it is unclear whether this results from joint criminal activity or from respondent being merely a witness to acts or transactions in which her spouse participated.

II. Even if certiorari were otherwise appropriate, this case is inappropriate for resolution of the questions presented.

Petitioner claims this case presents important and recurring questions not to be regarded as an isolated instance. The assertion is unsupported by citation of any kind.[19]

In view of the paucity of cases dealing with the privilege since this Court decided *Trammel*, respondent suggests that questions concerning the application and scope of the privilege arise infrequently and are in a state of development among the circuits.[20] Thus, it seems appropriate to await further development of the law before the questions presented in this appeal are addressed.

The first question is not raised squarely by the facts of this case. The court of appeals exercised sound discretion in allowing the application of the privilege where it cited tactics by the government demonstrably lacking in good faith.[21] This view is supported considering the availability of other evidence making it unnecessary to override the privilege.

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19. Fed.R.Crim.Pro. 6(e)(2) mandates a rule of secrecy in grand jury proceedings, however allowing always an attorney for the government to be present. Accordingly, only the government could possess statistics which would show how frequently the privilege is invoked before grand juries. Research has disclosed no such record. It is clear that joint criminal activity between spouses creates a bar to testimony by a witness, not merely by invoking the privilege against adverse spousal testimony, but primarily by invocation of the privilege against self-incrimination. It is doubtful that cases frequently occur where, both spouses sharing criminal responsibility, the government would find it desirable to remove the Fifth Amendment bar by immunizing one spouse in order to gain reluctant testimony against the other. Without a grant of immunity the validity of subpoenaing such a witness is subject to serious scrutiny. *United States v. Mandujano*, 425 U.S. 564 (1976); United States Attorneys' Manual, Tit. 9, §11.251.

20. *United States v. VanDrunen*, *supra*, relied on by petitioner, was decided prior to this Court's decision in *Trammel*.

21. See, *Branzburg v. Hayes*, 408 U.S. at 707.

A previous decision of the court of appeals squarely raised the second question presented.[22] Petitioner cites this Court's grant of certiorari in *Trammel v. United States, supra,* as an indication that the Court might disagree with the court of appeals in this case, even though the question was raised not until the government's suggestion for rehearing en banc. In denying rehearing the court of appeals did not reach this question.[23] Moreover, the hearing in the district court (C.A. App. 85a-161a) shows no answer by respondent establishing clear facts of joint criminal activity, resulting in a record which only suggests a factual foundation for the second question. In view of a barren record supporting the issue, the question is not raised properly for this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NICHOLAS J. NASTASI
Counsel for Respondent

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22. See *In Re Grand Jury (Malfitano), supra.*

23. In *Branzburg, supra,* this Court stated, "other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance." 408 U.S. at 708.